

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
WHEELING DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

RG STEEL WHEELING, LLC, (formerly
known as SEVERSTAL WHEELING, LLC,
SEVERSTAL WHEELING, INC., and
WHEELING PITTSBURGH STEEL CORP.),
and MOUNTAIN STATE CARBON, LLC

Defendants.

CIVIL ACTION NO. 5:12-CV-0019
(Chief Judge Bailey)

**DEFENDANT MOUNTAIN STATE CARBON, LLC's REPLY TO
THE UNITED STATES' RESPONSE TO
MOTION TO STAY PROCEEDINGS AND COMMENCE MEDIATION**

Defendant Mountain State Carbon, LLC ("Mountain State Carbon") hereby replies to the United States' Response to MSC's Motion to Stay Proceedings and Commence Mediation ("Response").

1. The United States recommended in its Response that the Court delay mediation until MSC submitted a good-faith settlement response to the United States' February 27, 2013 settlement offer. *See* Response at 2.
2. On August 27, 2013, MSC sent settlement correspondence to the United States, including a good-faith, reasonable settlement proposal.
3. Accordingly, the United States' objection to immediate commencement of mediation is presumably resolved. MSC now respectfully repeats its request that the Court issue an order to commence mediation and appoint a judicial officer to conduct the mediation.

4. MSC also respectfully repeats its request that the Court immediately stay all proceedings for a period of ninety (90) days.

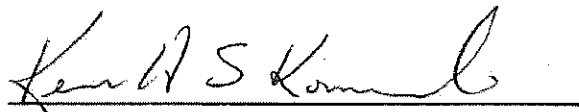
5. Pursuant to the Scheduling Order in this case, the parties are currently subject to a September 20 deadline for dispositive motions. *See* Docket No. 37. That deadline is now slightly more than three weeks away. It is impossible for the parties to dedicate the time and attention required for successful mediation, if the parties are simultaneously focused on preparation of dispositive motions.

WHEREFORE, Mountain State Carbon respectfully requests that this Court enter an Order in the form attached hereto granting Mountain State Carbon's motion to stay in the above-captioned civil action for ninety days as to all claims and defenses and to commence mediation.

Respectfully submitted:

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CERTIFICATE OF SERVICE


I hereby certify that, on August 27, 2013, the foregoing **DEFENDANT MOUNTAIN STATE CARBON, LLC's REPLY TO THE UNITED STATES' RESPONSE TO MOTION TO STAY PROCEEDINGS AND COMMENCE MEDIATION** was filed with the Clerk of Court using the CM/ECF system, notification of such filing to be sent to all registered users, including all counsel of record.

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DEFENDANT MOUNTAIN STATE CARBON, LLC's
MOTION TO STAY PROCEEDINGS AND COMMENCE MEDIATION

The caption in this case is misleading. RG Steel Wheeling, LLC no longer exists. It went bankrupt and nearly all of the operations have been cut up and sold for scrap. Mountain State Carbon “remains.” It has been operating at less than fifty percent capacity for more than a year. It continues to “invest” in its operations to try to stay alive, but the economy and the demand for its product – coke – are on life-support. It has now been fourteen years since the federal government sent its Multi-Media Environmental SWAT team to scour the operations of five steel-making operations across the river from each other in West Virginia and Ohio (then known as Wheeling-Pittsburgh Steel Corporation headquartered in the now-vacant building next to the Federal Courthouse). The inspection involved a dozen inspectors and lasted weeks. The good and predictable news was that they didn’t find much to complain about in 1999. Wheeling-Pittsburgh Steel Corporation was managed well under even-then extremely difficult financial conditions. After Chapter “33” bankruptcy (three Chapter 11’s), little is left from the original

list of USEPA concerns. Much was discharged in bankruptcies. Much was also rendered moot because steelmaking operations were idled then demolished.

Regardless, the United States Environmental Protection Agency ("USEPA"), through the United States Department of Justice ("USDOJ"), pushes on defiantly against Mountain State Carbon, or what is left of it. USDOJ originally asked the States of Ohio and West Virginia to join it as plaintiffs. Ohio declined and West Virginia withdrew. USDOJ declined too. They declined Mountain State Carbon's offer to address the air issues that had been raised by having a team of experts observe operations then develop an action plan. USDOJ refused to participate in this scheduled activity because Mountain State Carbon would not also agree to the USDOJ's terms for other issues that have no environmental consequence or adverse effects. (Mountain State Carbon has moved this process along with the West Virginian Department of Environmental Protection – the agency to whom USEPA delegated primary responsibility for Clean Air Act administration.) But progress on the only environmental issue was not enough. USDOJ wanted Mountain State Carbon to agree to have the coke plan called a "Hazardous Waste Disposal Facility," a ridiculous concept that exists at no other production facility in the United States. Alternatively, USDOJ wanted Mountain State to stop recycling and start disposing of it intermediates at third party landfills. In fact, USDOJ wanted to stop all forms of recycling at a facility so adept at recycling it is reflected in the federal regulations for recycling. (USEPA has recognized coke-making operations as one of the few business in America that can recycle all of the materials generated on site.) Thus, not being satisfied with a notch on its gun, USDOJ has applied heavy-handed, scorched earth litigation tactics to try to bring a weakened operating facility to its knees. That is not justice, it is oppression or extortion. But it is working. Mountain State Carbon asks this Honorable Court to intervene before the costs of litigation bring about the worst possible result – facility shut down and liquidation.

Thus, Defendant Mountain State Carbon, LLC ("Mountain State Carbon") files this motion to stay the above-referenced civil action for ninety (90) days in its entirety, including as to all claims and defenses relating to the coke production and by-products facility at issue in this case located in Follansbee, West Virginia (the "Follansbee Facility"). Mountain State Carbon requests the stay in order to facilitate settlement discussions and, in furtherance of those discussions, requests that this Court order mediation and appoint a judicial officer to conduct the mediation pursuant to Local Rule 16.06.

1. As discussed in more detail below, Mountain State Carbon is experiencing extreme financial hardship, making further defense in this lawsuit nearly impossible. Mountain State Carbon also believes that resolution of this case is closely within reach through negotiated or mediated settlement.

Mountain State Carbon is Negatively Impacted by RG Steel Wheeling's Bankruptcy

2. The Follansbee Facility is owned by Mountain State Carbon, which is a joint venture of RG Steel Wheeling, LLC ("RG Steel Wheeling") and SNA Carbon, LLC. RG Steel Wheeling was the operator of the Follansbee Facility through August 31, 2012. As of September 1, 2012, Mountain State Carbon took over as the operator of the Follansbee Facility. At this time, RG Steel Wheeling still owns half of the shares in Mountain State Carbon, but the last quarterly meeting in which it had board representation was in March 2012.

3. RG Steel Wheeling is currently in bankruptcy proceedings and is being liquidated. The Bankruptcy Court last week approved the settlement of all environmental claims against RG Steel. During these bankruptcy proceedings, RG Steel Wheeling has sold its assets in Ohio that are described in the United States' Complaint as the Steubenville and Mingo Junction Facilities and is in the process of liquidating its remaining assets.

4. There has been no interest from potential buyers for RG Steel Wheeling's 50% ownership, primarily due to economic conditions in the steel industry and related industries.

5. RG Steel's steel mill, which had been purchasing half of Mountain State Carbon's produced coke, has shut down and will not operate again. This has also resulted in increased production costs, which negatively impact Mountain State Carbon's working capital.

6. Mountain State Carbon may also be liable for other expenses as a result of the bankruptcy, the amounts of which are currently unknown.

Poor Economic Conditions Limit Opportunities to Recover

7. Coke is a primary input for the production of steel. Its demand, therefore, is affected by the demand for steel. Steel is used in a wide array of industries and products, making the steel industry highly sensitive to macroeconomic conditions.¹

8. The global economic downturn that began in 2008 has had dire consequences for the steel industry. Steel production fell dramatically in 2009, and sales of metallurgical coal to domestic coke foundries declined by more than 25% in 2009. The steel industry experienced a moderate recovery in late-2009 as global economic activity rebounded somewhat, but demand for steel remains below the pre-recession levels. The automotive and construction markets are the largest users of steel, and while the automotive industry has rebounded since 2009, the construction market has remained sluggish, impacting steel companies' earnings. Even into 2013, the steel industry continues to struggle with oversupply in the U.S., a European economy hampered by debt crises and other issues, and slower growth in both China's real estate market and its broader economy.

¹ Construction, transportation, electrical appliances, and food packaging are among the many industries that rely heavily upon steel.

9. On June 3, 2013, 134 workers were laid off from PBS Coals and RoxCoal Severstal, other subsidiaries of Mountain State Carbon's parent company Severstal. The company cited the soft international and domestic coal markets due to weak economic growth and activity, as well as increasingly stringent regulations.

10. Given the ongoing poor market for steel, Mountain State Carbon does not foresee an end to its financial troubles in the near future.

Mountain State Carbon has Incurred Massive Debt

11. Due to its already strained working capital, MSC had to obtain a loan from SNA Carbon LLC of \$50 million due on December 30, 2019 with an annual interest rate of 8%. The amount currently outstanding is \$20 million.

Mountain State Carbon Faces Immense Financial Hardship

12. For the year ended December 31, 2012, Mountain State Carbon had net losses of over \$24 million. These losses have continued in 2013; for the five months ended May 30, 2013, Mountain State Carbon had net losses of nearly \$19 million.

13. Since the economic downturn began, Mountain State Carbon has been forced to markedly reduce its operations and production. It currently runs only one of its four coke oven batteries. Moreover, the only active battery is running at reduced capacity. Under these conditions, Mountain State Carbon cannot possibly achieve profitability and will continue to incur significant losses.

Mountain State Carbon has been Forced to Pay to Defend the Issues Raised in this Litigation for Fourteen Years

14. Since at least 1999, the EPA has persistently sought to find a basis for claims against Mountain State Carbon, despite strong evidence contradicting EPA's preconceived

notion of Mountain State Carbon as an environmental threat.² The agency has conducted numerous investigations, regularly requested volumes of documents, compelled Mountain State Carbon to make substantial operational modifications, all of which cost the company millions of dollars it could not afford to spend.

15. The massive burden has culminated in this protracted litigation, which is now in its 18th month. Mountain State Carbon has produced over 82,000 pages of documents in response to 64 Requests for Production and responded to 39 Interrogatories and 26 Requests for Admissions. It has received and reviewed over 61,000 documents from the U.S. Department of Justice. In addition to defending depositions of its employees, Mountain State Carbon has been forced to retain six experts to respond to the eight experts the U.S. has enlisted to testify.

16. Under the present Scheduling Order (Document No. 37), a high level of continuing activity will be required regarding the Follansbee Claims and Defenses over the coming months. Fourteen expert witness depositions are scheduled to occur between July 24 and August 23. With dispositive motions due September 20, 2013, Mountain State Carbon can no longer sustain the heavy burden required to defend itself.

Mountain State Carbon Wishes to Resolve this Lawsuit Without the Need for Further Litigation

17. Given the highly technical nature of this case, many of the issues have only recently come into focus through the exchange of expert reports. The time has now become ripe to engage in informed negotiation and mediation. As such, Mountain State Carbon is preparing

² For example, in response to reporting by USA Today, EPA tested Follansbee Middle School to determine whether the air toxics manganese, benzene, arsenic, and benzo(a)pyrene were present at levels that indicate cause for concern. None were found at levels that indicate cause for concern. See EPA's findings related to air monitoring at Follansbee Middle School, available at <http://www.epa.gov/air/sat/Follansbee.html> ("The concentrations of manganese, benzene, arsenic, and benzo(a)pyrene measured at the school are lower than those suggested by the information that helped identify this school for monitoring.")

settlement correspondence to the United States Department of Justice. Mountain State Carbon believes this correspondence will considerably advance talks.

18. In order to facilitate settlement discussions between the parties, Mountain State Carbon requests that this Court issue an order to commence mediation, pursuant to Local Rule 16.06.

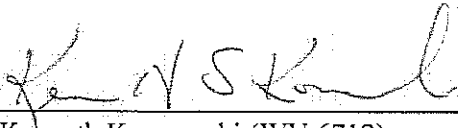
19. Mountain State Carbon further requests that the Court appoint a judicial officer to conduct the mediation, pursuant to Local Rule 16.06(b), in light of the complexity of the issues in this matter and Mountain State Carbon's inability to bear its proportionate share of mediation costs.

20. Settlement negotiations and mediation will not be effective if the litigation is allowed to continue. Both parties must be afforded the opportunity to allot sufficient time and resources to this process. The upcoming concentrated deposition and dispositive motion schedule will make it impossible for either side to fully pursue the very real prospect of resolving this case.

WHEREFORE, Mountain State Carbon respectfully requests that this Court enter an Order in the form attached hereto granting Mountain State Carbon's motion to stay in the above-captioned civil action for ninety days as to all claims and defenses and to commence mediation.

Respectfully submitted:

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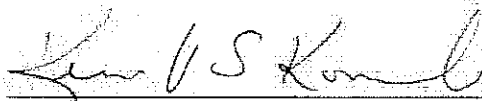
CERTIFICATE OF SERVICE

I hereby certify that, on **August 6, 2013**, the foregoing **DEFENDANT MOUNTAIN STATE CARBON, LLC's MOTION TO STAY PROCEEDINGS AND COMMENCE MEDIATION** was filed with the Clerk of Court using the CM/ECF system, notification of such filing to be sent to all registered users, including all counsel of record.

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